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ARGUMENT OF THOMAS EWING, JR.,

ON THE

JURISDICTION

AND ON

THE LAW AND THE EVIDENCE IN THE CASE

OF

DR. SAMUEL A. MUDD,

TRIED BEFORE A

Military Commission, of which Maj. Gen. David Hunter is President,

ON A CHARGE OF

CONSPIRACY TO ASSASSINATE THE PRESIDENT AND OTHER
CHIEF OFFICERS OF THE NATION.

MAY AND JUNE, 1865.

WASHINGTON:

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1865.

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CHARGE AND SPECIFICATION

AGAINST

DAVID E. HEROLD, GEORGE A. ATZERODT, LEWIS PAYNE, MICHAEL O'LAUGHLIN, JOHN H. SURREATT, EDWARD SPANGLER, SAMUEL ARNOLD, MARY E. SURREATT, AND SAMUEL A. MUDD.

CHARGE I. For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America, on or before the 6th day of March, A. D. 1865, and on divers other days between that day and the fifteenth day of April, A. D. 1865, combining, confederating, and conspiring together with one John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young, and others unknown, to kill and murder, within the Military Department of Washington, and within the fortified and intrenched lines thereof, Abraham Lincoln, late, and at the time of said combining, confederating, and conspiring, President of the United States of America, and Commander-in-chief of the army and navy thereof; Andrew Johnson, now Vice President of the United States aforesaid; William H. Seward, Secretary of State of the United States aforesaid; and Ulysses S. Grant, Lieutenant General of the army of the United States aforesaid, then in command of the armies of the United States, under the direction of the said Abraham Lincoln; and in pursuance of and in prosecuting said malicious, unlawful, and traitorous conspiracy aforesaid, and in aid of said rebellion, afterwards, to wit: on the 14th day of April, A. D. 1865, within the military department of Washington aforesaid, and within the fortified and intrenched lines of said military department, together with said John Wilkes Booth and John H. Surratt, maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln, then President of the United States and Commander-in-chief of the army and navy of the United States, as aforesaid, and maliciously, unlawfully, and traitorously assaulting, with intent to kill and murder, the said William H. Seward, then Secretary of State of the United States as aforesaid, and lying in wait, with intent maliciously, unlawfully, and traitorously to kill and murder the said Andrew Johnson, then being Vice President of the United States, and the said Ulysses S. Grant, then being Lieutenant General, and in command of the armies of the United States, as aforesaid.

Specification 1. In this: that they, the said David E. Herold, Edward Spangler, Lewis Payne, John H. Surratt, Michael O'Laughlin, Samuel Arnold, Mary E. Surratt, George A. Atzerodt, and Samuel A. Mudd, incited and encouraged thereunto by Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young, and others unknown, citizens of the United States aforesaid, and who were then engaged in armed rebellion against the

United States of America, within the limits thereof, did, in aid of said armed rebellion, on or before the 6th day of March, A. D. 1865, and on divers other days and times between that day and the 15th day of April, A. D. 1865, combine, confederate, and conspire together at Washington city, within the military department of Washington, and within the intrenched fortifications and military lines of the said United States, there being, unlawfully, maliciously, and traitorously, to kill and murder Abraham Lincoln, then President of the United States aforesaid, and Commander-in-chief of the army and navy thereof, and unlawfully, maliciously, and traitorously to kill and murder Andrew Johnson, now Vice President of the said United States, upon whom, on the death of said Abraham Lincoln, after the fourth day of March, A. D. 1865, the office of President of the United States, and Commander-in-chief of the army and navy thereof, would devolve; and to unlawfully, maliciously, and traitorously kill and murder Ulysses S. Grant, then Lieutenant General, and, under the direction of the said Abraham Lincoln, in command of the armies of the United States aforesaid, and unlawfully, maliciously, and traitorously to kill and murder Wm. H. Seward, then Secretary of State of the United States aforesaid, whose duty it was by law, upon the death of said President and Vice President of the United States aforesaid, to cause an election to be held for electors of President of the United States—the conspirators aforesaid designing and intending by the killing and murder of the said Abraham Lincoln, Andrew Johnson, Ulysses S. Grant, and William H. Seward, as aforesaid, to deprive the army and navy of the said United States of a constitutional Commander-in-chief; and to deprive the armies of the United States of their lawful commander; and to prevent a lawful election of President and Vice President of the United States aforesaid; and by the means aforesaid to aid and comfort the insurgents engaged in armed rebellion against the said United States as aforesaid, and thereby to aid in the subversion and overthrow of the Constitution and laws of the said United States.

And being so combined, confederated, and conspiring together in the prosecution of said unlawful and traitorous conspiracy, on the night of the 14th day of April, A. D. 1865, at the hour of about ten o'clock and fifteen minutes p. m., at Ford's theatre, on Tenth street, in the city of Washington, and within the military department and military lines aforesaid, John Wilkes Booth, one of the conspirators aforesaid, in pursuance of said unlawful and traitorous conspiracy, did, then and there, unlawfully, maliciously and traitorously, and with intent to kill and murder the said Abraham Lincoln, discharge a pistol then held in the hands of him, the said Booth, the same being then loaded with powder and a leaden ball, against and upon the left and posterior side of the head of the said Abraham Lincoln; and did thereby, then and there, inflict upon him, the said Abraham Lincoln, then President of the said United States, and Commander-in chief of the army and navy thereof, a mortal wound, whereof, afterwards, to wit: on the 15th day of April, A. D. 1865, at Washington city aforesaid, the said Abraham Lincoln died; and thereby, then and there, in pursuance of said conspiracy, the said defendants, and the said John Wilkes Booth, did, unlawfully, traitorously and maliciously, and with the intent to aid the rebellion, as aforesaid, kill and murder the said Abraham Lincoln, President of the United States, as aforesaid.

And in further prosecution of the unlawful and traitorous conspiracy aforesaid, and of the murderous and traitorous intent of said conspiracy, the said Edward Spangler, on said 14th day of April, A. D. 1865, at about the same hour of that day, as aforesaid, within said military department and the military lines aforesaid, did aid and assist the said John Wilkes

Booth to obtain entrance to the box in said theatre, in which said Abraham Lincoln was sitting at the time he was assaulted and shot, as aforesaid, by John Wilkes Booth; and also did then and there aid said Booth in barring and obstructing the door of the box of said theatre, so as to hinder and prevent any assistance to, or rescue of, the said Abraham Lincoln, against the murderous assault of the said John Wilkes Booth, and did aid and abet him in making his escape after the said Abraham Lincoln had been murdered in manner aforesaid.

And in further prosecution of said unlawful, murderous and traitorous conspiracy, and in pursuance thereof, and with the intent as aforesaid, the said David E. Herold did, on the night of the 14th of April, A. D. 1865, within the military department and military lines aforesaid, aid, abet and assist the said John Wilkes Booth in the killing and murder of the said Abraham Lincoln, and did then and there aid, and abet, and assist him, the said John Wilkes Booth, in attempting to escape through the military lines aforesaid, and did accompany and assist the said John Wilkes Booth in attempting to conceal himself and escape from justice, after killing and murdering said Abraham Lincoln, as aforesaid.

And in further prosecution of said unlawful and traitorous conspiracy, and of the intent thereof as aforesaid, the said Lewis Payne did, on the same night of the 14th day of April, A. D. 1865, about the same hour of ten o'clock fifteen minutes, p. m., at the City of Washington, and within the military department and the military lines aforesaid, unlawfully and maliciously make an assault upon the said William H. Seward, Secretary of State as aforesaid, in the dwelling-house and bed-chamber of him, the said William H. Seward, and the said Payne did then and there, with a large knife, held in his hand, unlawfully, traitorously, and in pursuance of said conspiracy, strike, stab, cut, and attempt to kill and murder, the said William H. Seward, and did thereby, then and there, and with the intent aforesaid, with said knife, inflict upon the face and throat of the said William H. Seward divers grievous wounds. And the said Lewis Payne, in further prosecution of said conspiracy, at the same time and place last aforesaid, did attempt, with the knife aforesaid, and a pistol held in his hand, to kill and murder Frederick W. Seward, Augustus H. Seward, Emrick W. Hansell, and George F. Robinson, who were then striving to protect and rescue the said William H. Seward from murder by the said Lewis Payne, and did then and there, with said knife and pistol held in his hands, inflict upon the head of said Frederick W. Seward, and upon the persons of said Augustus H. Seward, Emrick W. Hansell, and George F. Robinson, divers grievous and dangerous wounds, with intent, then and there, to kill and murder the said Frederick W. Seward, Augustus H. Seward, Emrick W. Hansell, and George F. Robinson.

And in further prosecution of said conspiracy and its traitorous and murderous designs, the said George A. Atzerodt did, on the night of the 14th of April, A. D. 1865, and about the same hour of the night aforesaid, within the military department and the military lines aforesaid, lie in wait for Andrew Johnson, then Vice President of the United States aforesaid, with the intent unlawfully and maliciously to kill and murder him, the said Andrew Johnson.

And in the further prosecution of the conspiracy aforesaid, and of its murderous and treasonable purposes aforesaid, on the nights of the 13th and 14th of April, A. D. 1865, at Washington city, and within the military department and military lines aforesaid, the said Michael O'Laughlin did then and there lie in wait for Ulysses S. Grant, then Lieutenant General and commander of the armies of the United States as aforesaid, with intent then and there to kill and murder the said Ulysses S. Grant.

And in further prosecution of said conspiracy, the said Samuel Arnold did, within the military department and military lines aforesaid, on or before the sixth day of March, A. D. 1865, and on divers other days and times between that day and the 15th day of April, A. D. 1865, combine, conspire with, and aid, counsel, abet, comfort, and support, the said John Wilkes Booth, Lewis Payne, George A. Atzerodt, Michael O'Laughlin, and their confederates, in said unlawful, murderous, and traitorous conspiracy, and in the execution thereof, as aforesaid.

And in further prosecution of the said conspiracy, Mary E. Surratt did, at Washington city, and within the military department and military lines aforesaid, on or before the sixth day of March, A. D. 1865, and on divers other days and times between that day and the 20th day of April, A. D. 1865, receive, entertain, harbor, and conceal, aid and assist, the said John Wilkes Booth, David E. Herold, Lewis Payne, John H. Surratt, Michael O'Laughlin, George A. Atzerodt, Samuel Arnold, and their confederates, with knowledge of the murderous and traitorous conspiracy aforesaid, and with intent to aid, abet, and assist them in the execution thereof, and in escaping from justice after the murder of the said Abraham Lincoln, as aforesaid.

And in further prosecution of said conspiracy, the said Samuel A. Mudd did, at Washington city, and within the military department and military lines aforesaid, on or before the sixth day of March, A. D. 1865, and on divers other days and times between that day and the twentieth day of April, A. D. 1865, advise, encourage, receive, entertain, harbor, and conceal, aid and assist, the said John Wilkes Booth, David E. Herold, Lewis Payne, John H. Surratt, Michael O'Laughlin, George A. Atzerodt, Mary E. Surratt, and Samuel Arnold, and their confederates, with knowledge of the murderous and traitorous conspiracy aforesaid, and with intent to aid, abet, and assist them in the execution thereof, and in escaping from justice after the murder of the said Abraham Lincoln, in pursuance of said conspiracy, in manner aforesaid.

By the PRESIDENT of the United States :

(Signed)

J. HOLT, *Judge Advocate General.*

Argument on the Plea to the Jurisdiction.

May it please the Court: The first great question—a question that meets us at the threshold is—Do you, gentlemen, constitute a court, and have you jurisdiction, as a court, of the persons accused, and the crimes with which they are charged? If you have such jurisdiction, it must have been conferred by the Constitution, or some law consistent with it, and carrying out its provisions.

1. The 5th article of the Constitution declares:

“That the judicial power of the United States shall be vested in one Supreme Court, and in such *inferior courts* as Congress may from time to time ordain and establish;” and that “the judges of both Supreme and *inferior courts* shall hold their offices during good behavior.”

Under *this* provision of the Constitution, none but courts ordained or established by Congress can exercise judicial power, and those courts must be composed of judges who hold their offices during good behavior. They must be independent judges, free from the influence of Executive power. Congress has not “ordained and established” you a court, or authorized you to call these parties before you and sit upon their trial, and you are not “*judges*” who hold your offices during good behavior. You are, therefore, no court under the Constitution, and have no jurisdiction in these cases, unless you obtain it from some other source, which overrules this constitutional provision.

The President cannot confer judicial power upon you, for he has it not. The *executive*, not the *judicial*, power of the United States is vested in him. His mandate, no matter to what man or body of men addressed, to try, and if convicted, to sentence to death a citizen, not of the naval or military forces of the United States, carries with it no authority which could be pleaded in justification of the sentence. It were no better than the simple mandate to take A B, C D, E F, and G H, and put them to death.

2. The President, under the 5th amendment to the Constitution, may constitute courts pursuant to the Articles of War, but he cannot give them jurisdiction over citizens. This article provides that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a pre-

sentment or indictment of a grand jury, *except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger.*

The presentment or indictment of a grand jury is a thing unknown to and inconsistent with your commission. You have nothing of the kind. Neither you nor the law officers who control your proceedings seem to have thought of any such thing. These defendants did not and do not belong to the "*land or naval forces*" of the United States—nor were they "*militia, in time of war or public danger, in actual service.*" The Constitution, therefore, in the article above cited, expressly says: *You shall not hold them to answer to any of the capital and infamous crimes with which they are charged.*

Is not a single, direct, constitutional prohibition, forbidding you to take jurisdiction in these cases, sufficient? If it be not, read the provision of the 3d section of the 3d article. It is as follows:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

But lest this should not be enough, in their anxious care to provide against the abuses from which England had recently escaped and which were still fresh in the memories of men—as the Star Chamber, the High Commission Courts, and their attendant enormities—the framers of the Constitution further provided, in the 6th amendment, that—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial *by an impartial jury* of the State and district wherein the crime shall have been committed."

Now, whence, and what, is the authority which overrules these distinct constitutional prohibitions, and empowers you to hold these citizens to answer, *despite the mandates* of the Constitution forbidding you?

Congress has not attempted to grant you the power; Congress could not grant it. A law to that effect, against the constitutional prohibition, would be merely void. Congress has authorized the suspension of the writ of *habeas corpus*, as the Constitution permits, (Art. I, sec. 9;) but the Constitution does not thereby permit the military to try, nor has Congress attempted to deliver over to the military, for *trial, judgment, and execution*, *American citizens*, not in the land or naval forces, or in the militia in actual service, *when accused of crime*. Congress and the President, the law-making power, were incompetent to this, and have not attempted it. Whence, then, comes the dispensation with the constitutional prohibition? Where and whence is the affirmative grant of jurisdiction under which you propose to try, and, if convicted, pass sentence upon these men, citizens of the United States—not soldiers, not militia-men—but citizens, engaged in the ordinary avocations of life? I am not permitted to know. Congress has not in any form attempted to violate or impair the Constitution. They have suspend-

ed the writ of *habeas corpus*; this goes to imprisonment—not trial, conviction, or punishment. This is the extreme limit to which the law-making power is permitted to go, and it is only in cases of strong necessity that this is permitted. Congress has repealed so much of the 102d section of the act of September 24th, 1789, as required that in all capital cases twelve petit jurors should be summoned from the county in which the offence was committed, (par. 221, sec. 102, repealed July 16, 1862, page 1164, sec. 22,) but has preserved all other legal provisions made in aid of the Constitution to protect citizens from the oppression of unregulated and unrestrained Executive power. The accused shall be tried upon an indictment or presentment of a grand jury. If two or more crimes of a like nature be charged, they must be set forth *in separate counts*. (Act of February 26, 1853, sec. 117.) You may not compel an accused to answer to a loose story or accusation of *several crimes in one count*. If the crime charged be treason, which this paper approaches more nearly than any thing else, the accused shall have a copy of the indictment, and a list of the jury, and of all the witnesses to be produced on the trial for proving the said indictment, (mentioning the names and places of abode of such witnesses and jurors,) delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences shall have such copy of indictment and list of the jury two entire days at least before the trial. (Act of April 30, 1790, sec. 24, p. 221.)

Against this array of constitutional and legal prohibition and regulation, I know of nothing that can be adduced, except, perhaps, an Executive order authorizing, by direct mandate or by implication, the thing to be done which the Constitution forbids you to do. If you be proceeding in obedience to such Executive mandate, and if that give jurisdiction, still you proceed in a form and manner which the Constitution and law expressly forbid. If my clients be charged with treason or murder, (and I conjecture they are charged with murder at least,) they must be proved to have been *present aiding in or actually committing the overt act, or the alleged murder*. For either of these the punishment on conviction is death. The Judge Advocate has been unable, in the cases of Arnold and Mudd, to present any evidence *remotely approaching* that prescribed by the Constitution and the laws as the condition of conviction; and yet I am led to infer that he will claim a conviction of one or both of them on the proof presented. What is the profession, on this and on the other side of the Atlantic, to think of such administration of criminal jurisprudence?—for this, the first of our State trials, will be read with avidity everywhere. I ask the officers of the Government to think of this carefully *now*, lest two or three years hence they may not like to hear it named.

But we may mistake the whole case as it presents itself to the mind of the Judge Advocate. We are here as counsel for the accused, but are not

allowed to know explicitly with what crime, *defined by law*, any one of them is charged, or what we are here to defend. No crime known to the law is legally charged in the paper which is here substituted for an indictment. In this paper three distinct crimes are strongly hinted at in a single charge, to each of which different rules of law and evidence are applicable and different penalties are attached; and I had wished to know, so that I might shape the defence of my clients accordingly, for *which* alleged or imputed crime any one, or each or all of them, are to be tried. This information has been denied us. The Judge Advocate puts these parties on trial, and refuses (in the most courteous terms) to advise their counsel on what law or authority he rests his claim to jurisdiction; of what crime he intends to convict each or any of the defendants; in what laws the crimes are defined and their punishments prescribed; or on what proof, out of the wild jungle of testimony, he intends to rest his claim to convictions.

But it has been said, and will perhaps be said again, in support of this jurisdiction, that the necessities of war justify it—and “*silent leges inter arma.*” So said the Roman orator when Rome had become a military despotism, and ceased forever to have liberty, and when she retained law only as the gift or by the permission of the ruling despot. “*The law is silent amid arms.*” Yes, it is so in a conquered country, when the victorious general chooses to put the law to silence; for he is an autocrat, and may, if he choose, be a despot. But how extravagant is the pretence that a bold, and spirited, and patriotic people, because they rise in their majesty and send forth conquering armies to rescue the Republic, thereby forfeit all constitutional and legal protection of life, liberty, and property!

Cases have often arisen, in which robber bands, whose vocation is piracy on the high seas, or promiscuous robbery and murder on land—*hostes humani generis*—may be lawfully put to the sword without quarter, in battle, or hung on the yard-arm, or otherwise put to death, when captured, according to the necessities of the case, without trial or other conviction, except the knowledge of the commanding general that they were taken *flagrante bello*, and that they are pirates or land robbers. A military court may be called, but it is *advisory* merely; the *General* acts, condemns, and executes. But the *Constitution* of the United States has nothing to do with this. It does not protect pirates or marauders, who are enemies of the human race; or spies, or even enemies taken in battle. It protects, not belligerent enemies, but only citizens and those persons not citizens who in civil life seek and claim its protection, or aliens who are engaged in its military or other service. The power of the commanding general over these classes is restrained only by the *usages* of war among civilized nations. But these defendants are not charged as spies or pirates, or armed and organized marauders, or enemies captured in war, or persons in the land

or naval service of the United States. They belong to none of these classes, over whom military discretion or martial law extends, unless they extend over and embrace *all* the people of the United States.

But if the jurisdiction in this case exist, whether by law or by the power of arms, I regret that a Military Commission should be charged with the trial of these causes. The crimes are, as far as hinted at and written about in the charge and specifications, all cognizable in our civil courts. Those courts are open, unobstructed, without a single impediment to the full and perfect administration of justice—ready and prompt, as they always are, to perform the high duties which the well-known principles of law under the Constitution devolve on them. What good reason can be given in a case like this, to a people jealous of their rights, for a resort here and now to military trials and military executions? We are at the advent of a new, and I trust a successful, Administration. A taint such as this—namely, the needless violation of the constitutional rights of the citizen—ought not to be permitted to attach to and infect it. The jurisdiction of this Commission has to be sought *dehors* the Constitution, and against its express prohibition. It is, therefore, at least of doubtful validity. If that jurisdiction do not exist; if the doubt be resolved against it by our judicial tribunals when the law shall again speak, the form of trial by this unauthorized Commission cannot be pleaded in justification of the seizure of property or the arrest of person, much less the infliction of the death penalty. In that event, however fully the recorded evidence may sustain your findings, however moderate may seem your sentences, however favorable to the accused your rulings on the evidence, your sentence will be held *in law* no better than the rulings of Judge Lynch's courts in the administration of lynch law. When the party now in power falls—as in the vicissitudes of things it must one day fall, and all the sooner for a reckless use of its present power—so it will be viewed by that party which succeeds it. This is to be expected, and, indeed, hoped; but if, unfortunately, this proceeding be then accepted and recorded as a precedent, we may have fastened on us a military despotism. If we concede that the exercise of jurisdiction claimed is *now* necessary, and for the best possible object, before we consent that it stand as a precedent in our jurisprudence, we should recall to mind the statesmanlike and almost prophetic remarks of Julius Cæsar, in the Roman Senate, on the trial of Lentulus and his accomplices in Catiline's conspiracy: "*Abuses often grow from precedents good in principle; but when the power falls into the hands of men less enlightened or less honest, a just and reasonable precedent receives an application contrary to justice and reason.*" It is to be remembered that criminal trials involving capital punishment were not then within the competency of the Roman Senate;

and neither the Consul nor the Senate, nor both of them, had the right to condemn a Roman citizen without the concurrence of the people.*

If you believe you possess the power of life and death over the citizens of the United States in States where the regular tribunals can be safely appealed to, still, for the sake of our common country and its cherished institutions, do not press that power too far. Our judicial tribunals, at some future day, I have no doubt, will be again in the full exercise of their constitutional powers, and may think, as a large proportion of the legal profession think now, that your jurisdiction in these cases is an unwarranted assumption; and they may treat the judgment which you pronounce and the sentence you cause to be executed as your own unauthorized acts.

This assumption of jurisdiction, or this use of a legitimate jurisdiction, not created by law and not known to the law or to legal men, has not for its sanction even the plea of *necessity*. It may be *convenient*. Conviction may be easier and more certain in this Military Commission than in our constitutional court. Inexperienced as most of you are in judicial investigations, you can admit evidence which the courts would reject, and reject what they would admit, and you may convict and sentence on evidence which those courts would hold to be wholly insufficient. Means, too, may be resorted to by detectives, acting under promise or hope of reward, and operating on the fears or the cupidity of witnesses, to obtain and introduce evidence, which cannot be detected and exposed in this military trial, but could be readily in the free, but guarded, course of investigation before our regular judicial tribunals. The Judge Advocate, with whom chiefly rests the fate of these citizens, is learned in the law, but from his position he cannot be an impartial judge, unless he be more than man. He is the prosecutor in the most extended sense of the word. As in duty bound, before this Court was called, he received the reports of detectives, pre-examined the witnesses, prepared and officially signed the charges, and as principal counsel for the Government, controlled on the trial the presentation, admission, and rejection of evidence. In our courts of law, a lawyer who has heard his client's story, if transferred from the bar to the bench, may not sit in the trial of the cause, lest the ermine be sullied through the partiality of counsel. This is no mere theoretical objection—for the union of prosecutor and judge works practical injustice to the accused. The Judge Advocate controls the admission and rejection of evidence—knows what will aid and what will injure the case of the prosecution, and inclines favorably to the one and unfavorably to the other. The defence is met with a bias of feeling and opinion on the part of the judge who controls the pro-

*Cicero, who was Consul, Cato, Silanus, and others of their associates in the Senate, were afterwards tried for the murder of the conspirators, convicted, and banished.

ceedings of the Court, and on whom, in great measure, the fate of the accused depends, which morals and law alike reject. Let it not be supposed I censure or reflect on any one, for I do not. The wrong suffered by the parties accused has its root in the vice of this system of trial, which I have endeavored to expose.

Because our Chief, so venerated and beloved, (and no one venerated and loved him more than I,) has fallen by the hand of a ruthless assassin, it ought not to follow that the Constitution and law should be violated in punishing men suspected of having compassed his death, or that men not *legally* found guilty should be sacrificed in vengeance as victims generally because of the crime. There may be a lurking feeling among men which tends to this harshness of retribution, regardless of the innocence of those on whom vengeance may fall. Tending to this feeling, exciting or ministering to it, was the two days' testimony which, without other apparent point or purpose, detailed the horrors of the Libby Prison; and the evidence, that, in 1861, one of my clients took part in the rebellion; and the further testimony (which we showed was utterly fabulous) that another of my clients, in 1863 or 1864, entertained rebel officers and soldiers, and corresponded with rebels in Richmond. As if to say: "What matters it how we try, or whether we legally try at all, provided we convict and execute men who have been associated with, or in sympathy with, monsters such as those? Homer makes Achilles immolate, at the funeral pyre of Patroclus, twelve Trojan captives, simply because they *were* Trojans, and because Patroclus had fallen by a Trojan hand. If that principle of judicial action be adopted here, it were surely not too much to sacrifice to the *manes* of one so beloved and honored as our late Chief Magistrate a little lot of rebel sympathizers, because, like the assassin, some of them, at some time, participated in the rebellion, or gave aid and comfort to rebels. If this course of reasoning do not develop the object of that strange testimony, I know not how to read it. Indeed, a position taken by the learned Assistant Judge Advocate, in discussing my objection to the part of that evidence which relates to my clients, goes to this—and even beyond it—namely, that participation in the rebellion was participation in the assassination, and that the rebellion itself formed part of the conspiracy for which these men are on trial here.

THOMAS EWING, JR.,

Of Counsel for Samuel A. Mudd, Samuel Arnold, and Edward Spangler.

Argument on the Law and the Evidence in the Case of Dr. Samuel A. Mudd.

May it please the Court : If it be determined to take jurisdiction here, it then becomes a question vitally important to some of these parties—a question of life and death—whether you will punish only offences created and declared by *law*, or whether you will make and declare the past acts of the accused to be crimes, which acts the law never heretofore declared criminal; attach to them the penalty of death, or such penalty as may seem meet to you; adapt the evidence to the crime and the crime to the evidence, and thus convict and punish. This, I greatly fear, may be the purpose, especially since the Judge Advocate said, in reply to my inquiries, that he would expect to convict “*under the common law of war.*” This is a term unknown to our language—a *quiddity*—wholly undefined and incapable of definition. It is, in short, just what the Judge Advocate chooses to make of it. It may create a fictitious crime, and attach to it arbitrary and extreme punishment, and who shall gainsay it? The *laws* of war—namely, our *Articles of War*—and the habitual practice and mode of proceeding under them, are familiar to us all; but I know nothing, and never heard or read of a common law of war, as a code or system under which military courts or commissions in this country can take and exercise jurisdiction not given them by express legal enactment on constitutional grant. But I still hope the *law* is to govern, and if it do, I feel that my clients are still safe.

I will now proceed to show you, that on the part of one of my clients—Dr. Mudd—no crime known to the law, and for which it is pretended to prosecute, can possibly have been committed. Though not distinctly informed as to the offence for which the Judge Advocate claims conviction, I am safe in saying, that the testimony does not point to treason, and if he is being tried for treason, the proceedings for that crime are widely de-

parted from. The prosecution *appears* to have been instituted and conducted under the proclamation of the Secretary of War, of April 20, 1865. This makes it a crime, punishable with death, to harbor or screen Booth, Atzerodt, or Herold, or to aid or assist them to escape. It makes it a crime to do a *particular act*, and punishes that crime with death. I suppose we must take this *proclamation as law*. Perhaps it is part of what the Judge Advocate means when he speaks of the "common law of war." If this be so, my clients are still safe, if we be allowed to construe it *as laws are construed by courts of justice*. But I will show, first, that Dr. Mudd is not, and cannot possibly be, guilty of any offence known to the law.

1. Not of treason. The overt act attempted to be alleged is the murder of the President. The proof is conclusive, that at the time the tragedy was enacted Dr. Mudd was at his residence in the country, thirty miles from the place of the crime. Those who committed it are shown to have acted for *themselves*, not as the instruments of Dr. Mudd. He, therefore, cannot be charged, according to law and upon the evidence, with the commission of this overt act. There are not two witnesses to prove that he did commit it, but abundant evidence to show negatively that he did not.

Chief Justice Marshall, in delivering an opinion of the Court in Burr's case, says: "Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "*perform a part*" which will furnish the *overt act*, and they must be *leagued* with the conspiracy." (4 Cr., 474.)

Now, as to Dr. Mudd, there is no particle of evidence tending to show that he was ever leagued with traitors in their treason; that he had ever, by himself, or by adhering to, and in connection with, others, levied war against the United States. It is contended that he joined in compassing the death of the President, ("*the King's death*."') Foster, p. 149, speaking of the treason of compassing the king's death, says: "From what has been said it followeth, that in every indictment for this species of treason, and indeed for levying war and adhering to the king's enemies, *an overt act must be alleged and proved*." (4 Cr., 490.)

The only *overt act* laid in these charges against Mudd is the act of assassination, at which it is claimed he was constructively present and participating. His presence, and participation, or procurement, must be *proved* by *two witnesses*, if the charge be treason; and such presence, participation, or procurement, be the *overt act*.

Chief Justice Marshall, in Burr's case, (Dall., 500,) says: "Collateral points, say the books, may be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage, if they were guilty, (or in any way in the guilty act of others,) a collateral point? This

cannot be. The presence of the party, when presence is necessary, being part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the Constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the Constitution and the law. The mind is not to be led to the conclusion that the individual was present by a train of conjectures or inferences, or of reasoning. *The fact itself must be proved by two witnesses*, and must have been committed within the district."

2. Not of murder. For the law is clear, that, in cases of treason, presence at the commission of the overt act is governed by the same principle as constructive presence in *ordinary felonies*, and has no other latitude, greater or less, except that in proof of treason *two witnesses* are necessary to the overt act, and one only in murder and other felonies. "A person is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so, if necessary." (4 Cr., 492.) Persons not sufficiently near to give assistance are not principals. And although an act be committed in pursuance of a previous concerted plan, those who are not present, or so near as to be able to afford aid and assistance, at the time when the offence is committed, are not principals, but accessories before the fact. (Wharton, Am. Crim. Law, 112 to 127.)

It is, therefore, perfectly clear, upon the law as enacted by the Legislature and expounded by jurists, that Dr. Mudd is not guilty of participating in the murder of the President; that he was not actually or constructively present when the horrid deed was done, either as a traitor, chargeable with it as an overt act, or a conspirator, connected as a principal felon therewith.

3. The only other crimes defined by law for the alleged commission, of which the Judge Advocate may, by possibility, claim the conviction of the accused, are:—1st. The crime of *treasonable conspiracy*, which is defined by the law of 21st July, 1861, and made punishable by fine not exceeding \$6,000, and imprisonment not exceeding six years. 2d. The crime of being an *accessory before, or after, the fact* to the crimes of murder, and of assault with intent to kill. That the accused is not guilty of either of these crimes, will be clearly shown in the discussion of the evidence which follows.

4. Admitting the Secretary's proclamation to be law, it, of course, either supersedes or defines the unknown something or nothing which the Judge Advocate calls "the common law of war." If so, it is a definite, existing thing, and I can defend my clients against it; and it is easy to show that Dr. Mudd is not guilty of violating that proclamation. He did not, *after the date of the proclamation*, see either of the parties named therein—

dress the wound of Booth, or point out the way to Herold—and the proclamation relates to *future* acts, not to *past*.

5. But of the *common law of war*, as distinct from the usages of Military Courts, in carrying out and executing the Articles of War, I know nothing, and, on examining the books, I find nothing. All that is written down in books of law or authority I am, or ought to be, prepared to meet; but it were idle and vain to search for and combat a mere phantom of the imagination, without form and void.

I now pass to a consideration of the evidence, which I think will fully satisfy the Court that Dr. Mudd is not guilty of treasonable conspiracy, or of being an accomplice, before or after the fact in the felonies committed.

The accused has been a practising physician, residing five miles north of Bryantown, in Charles county, Maryland, on a farm of about five hundred acres, given to him by his father. His house is between twenty-seven and thirty miles from Washington, and four or five miles east of the road from Washington to Bryantown. It is shown by Dr. George Mudd, John L. Turner, John Waters, Joseph Waters, Thomas Davis, John McPherson, Lewellyn Gardiner, and other gentlemen of unimpeached and unquestionable loyalty, who are in full sympathy with the Government, that he is a man of most exemplary character—peaceable, kind, upright, and obedient to the laws. His family being slaveholders, he did not like the anti-slavery measures of the Government, but was always respectful and temperate in discussing them, freely took the oath of allegiance prescribed for voters, (Dr. George Mudd,) supported an Union candidate against Harris, the secession candidate, for Congress, (T. L. Gardiner,) and for more than a year past regarded the rebellion a failure. (Dr. George Mudd.) He was never known or reported to have done an act or said a word in aid of the rebellion, or in countenance or support of the enemies of the Government.

An effort was made, over all objections and in violation, I respectfully submit, of the plainest rules of evidence, to blacken his character as a citizen, by showing that he was wont, after the war broke out, to threaten his slaves to send them to Richmond “to build batteries.” But it will be seen hereafter, that all that part of the testimony of the same witnesses, which related to the presence of Surratt and of rebel officers at the house of the accused, was utterly false. And Dyer, in presence of whom Eglen says the threat was made to him, swears he was not in the country then, and no such threat was ever made in his presence. The other colored servants of the accused, Charles and Julia Bloyce, and Betty and Frank Washington,

say they never heard of such threats having been made; and J. T. Mudd and Dr. George Mudd, and his colored servants Charles and Julia Bloyce, and Betty and Frank Washington, describe him as being remarkably easy, unexactng, and kind to all about him—slaves and freemen.

From this brief reference to the evidence of the character of the accused, I pass to a consideration of the testimony adduced to prove his connection with the conspiracy.

And, first, as to his *acquaintance with Booth*. J. C. Thompson says, that early in November last Booth went to the house of witness's father-in-law, Dr. William Queen, four or five miles south of Bryantown, and eight or ten from Dr. Mudd's, and presented a letter of introduction from a Mr. Martin, of Montreal, who said he wanted to see the county. It does not appear who Martin was. Booth said his business was to invest in land and to buy horses. He went with Dr. Queen's family to a church next day, in the neighborhood of Bryantown, and was there *casually* introduced, before service, by Thompson, to the accused. After service Booth returned to Queen's house, and stayed until next morning, when he left. While at Queen's, he made inquiries of Thompson as to horses for sale, the price of lands, their qualities, the roads to Washington, and to the landings on the Potomac; and Thompson told him that the father of Dr. Samuel Mudd was a large landholder, and might sell part of his land. On Monday morning, after leaving Dr. Queen's, Booth came by the house of the accused, who went with him to the house of George Gardiner, to look at some horses for sale. The accused lives about one quarter of a mile from Gardiner's, (Mary Mudd, Thomas L. Gardiner,) and on the most direct road to that place from Dr. Queen's, through Bryantown. (Mary Mudd, Hardy.) There Booth bought the one-eyed saddle-horse which he kept here, and which Payne rode after the attempted assassination of Mr. Seward. Mudd manifested no interest in the purchase, but after it was made Booth directed the horse to be sent to Montgomery's Hotel, in Bryantown, and Booth and the accused rode off together in the direction of the house of the accused, which was also the direction of Bryantown. Witness took the horse to Bryantown next morning, and delivered him in person to Booth there. Witness says the horse was bought on *Monday*, but he thinks in the latter part of November; though he says he is "one of the worst hands in the world to keep dates."

Thompson further says, that after Booth's first introduction and visit to Dr. Queen's, "he came there again, and stayed all night, and left very early next morning. I think it was about the middle of December following his first visit there."

There is nothing whatever to show that Mudd saw Booth on this *second* visit, or at any other time, in the country, prior to the assassination; but

a great deal of evidence that he never was at Mudd's house, or in his immediate neighborhood, prior to the assassination, except once, and on his first visit. I will refer to the several items of testimony on this point.

1st. Thomas L. Gardiner says he was back and forth at Mudd's house, sometimes every day, and always two or three times a week, and never heard of Booth being there, or in the neighborhood, after the purchase of the horse and before the assassination.

2d. Mary Mudd says she saw Booth one Sunday in November at church, in Dr. Queen's pew, and with his family, and that she heard of his being at the house of her brother, the accused, on that visit, but did not hear that he stayed all night; and that on the same visit he bought the horse of Gardiner. She lives at her father's, on the farm adjoining that of accused, and was at his house two or three times a week, and saw him nearly every day on his visits to his mother, who was an invalid, and whose attending physician he was; and never saw or heard of Booth, except on that one occasion, before the assassination.

3d. Fanny Mudd, sister of the accused, living with her father, testifies to the same effect.

4th. Charles Bloyce was at the house of the accused Saturday and Sunday of each week of last year until Christmas Eve, (except six weeks in April and May,) and never saw or heard of Booth's being there.

5th. Betty Washington (colored) lived there from Monday after Christmas until now, and never saw or heard of Booth there before the assassination.

6th. Thomas Davis lived there from 9th January last. Same as above.

Nor is there any evidence whatever of Booth's having *stayed all night* with the accused on the visit when the horse was bought of Gardiner, or at any other time, except that of Col. Wells, who says, that after Mudd's arrest, "he said, in answer to another question, that he met Booth some time in November. I think he said he was introduced by Mr. Thompson, a son-in-law of Dr. Queen, to Booth. I think he said the introduction took place at the chapel or church on Sunday morning; that, after the introduction had passed between them, Thompson said, Booth wants to buy farming lands; and they had some little conversation on the subject of lands, and then Booth asked the question, whether there were any desirable horses that could be bought in that neighborhood cheaply; that he mentioned the name of a neighbor of his who had some horses that were good travellers; and that he remained with him that night, I think, and next morning purchased one of those horses." Now, it will be recollected that Thompson says Booth stayed at Dr. Queen's on that visit Saturday night and Sunday night, and Thomas L. Gardiner says the horse was bought Monday morning. So that, if Col. Wells is correct in recollecting what Mudd said, then Thompson must be wrong. It is more probable that

Thompson is right, as to Booth's having spent Sunday night at Queen's. Thompson's testimony is strengthened, too, by that of Mary Mudd, Fanny Mudd, and Charles Bloyce, who would, in all probability, have heard the fact of Booth spending Sunday night at the house of the accused, had he done so; but they did not hear it.

It is here to be observed, that though the accused was not permitted to show, by Booth's declarations *here*, that he was contemplating and negotiating purchases of lands in Charles county, yet evidence was admitted as to his declarations made *there* to that effect. Dr. Bowman, of Bryantown, says that Booth negotiated with him, on one of these visits, for the purchase of his farm, and also talked of buying horses. And a few days after witness had negotiated with Booth for the sale of his farm, he met Dr. Mudd, and spoke of the negotiation with Booth, and Mudd said, "*Why, that fellow promised to buy my land.*" It is also shown by Dr. Blanford, Dr. Bowman, M. P. Gardiner, and Dyer, that Mudd, for a year past, wanted to sell his land, and quit farming.

This, then, is all that is shown of any meeting between Mudd and Booth in that country before the assassination—a casual introduction at church on Sunday in November—Booth going next morning to Mudd's, talking of buying his farm, and riding with him a quarter of a mile to a neighbor's to buy a horse, and their going off together towards Mudd's and Bryantown, where the horse was delivered to Booth next morning.

We will now turn to consider the evidence as to the accused's acquaintance with *John H. Surratt*. If he knew Surratt at all, the fact is not shown by, nor inferable from, the evidence. Miss Surratt was educated at Bryantown, before the war, and her family lived at Surrattsville, and kept the hotel there, (which is on the road from Dr. Mudd's house to Washington,) until they removed, in October last, to a house on H street, in this city, where they have since resided. (Miss Surratt, Holahan, Weichmann.) Dr. Mudd *probably* had met Surratt at the hotel at Surrattsville, or, before the war, at Bryantown, while his sister was at school; but it is not shown by credible testimony that he knew him at all. Let us examine the evidence on this point.

1st. *Mary Sims*, formerly Dr. Mudd's slave, says that a man whom Dr. and Mrs. Mudd called *Surratt* was at Mudd's house from almost every Saturday night until Monday night through the latter part of the *winter*, and through the spring and summer of *last year* until apples and peaches were ripe, when she saw him no more; and that on the last of November she left Dr. Mudd's house. That he *never slept in the house*, but took dinner there six or seven times. That *Andrew Gwynn*, *Bennett Gwynn*, Capt. Perry, Lieut. Perry, and Capt. White, of Tennessee, slept with Surratt in the pines near the spring, on bed-clothes furnished from Dr. Mudd's house,

and that they were supplied by witness and by Dr. Mudd with victuals from the house. That William Mudd, a neighbor, and Rachel Spencer, and Albin Brooke, members of Mudd's household, used to see Surratt there then. She says that the lieutenants and officers had epaulettes on their shoulders, gray breeches with yellow stripes, coat of same color and trimming. Their horses were kept in Dr. Mudd's stable, by Milo Sims.

2d. *Milo Sims*, brother of Mary, fourteen years old, formerly slave of Dr. Mudd, left there Friday before last Christmas. Saw *two or three men* there *last summer*, who slept at the spring near Dr. Mudd's house. Bedding taken from the house; meals carried by *Mary Sims*, generally, though they sometimes ate in the house, and they all slept at the spring, except one called John Surratt, who slept once in the house. Don't say how long they stayed. It was in "planting tobacco time." He attended their horses in Dr. Mudd's stable.

3d. Rachel Spencer, slave of Dr. Mudd and cook at his house, left him early in January, 1865; saw five or six men around Dr. Mudd's house *last summer*; slept in the pines near the house, and were furnished with meals from it. Were dressed in black and blue. *Were there only a week, and never saw them there before or since.* She heard no names of the men except *Andrew Gwynn* and *Watt Bowie*. That *Albin Brooke* lived at Dr. Mudd's then, and was with these men occasionally.

4th. Elzee Eglen, formerly Dr. Mudd's slave, left him 20th August, 1863; saw a party sleeping in the pines, by the spring, near the house, *summer before last*. Knew *Andrew Gwynn*, and he was one of them; did not recollect any other names. *Mary Sims* carried them meals, and *Milo Sims* attended the horses in Dr. Mudd's stable. Some wore gray clothes with brass buttons, but without other marks—some black clothes. Did not say how many there were, nor how long they stayed.

5th. Melvina Washington, formerly Dr. Mudd's slave, left him October, 1863; saw party sleeping in the pines near the house *summer before last*; victuals furnished from the house. Party stayed there *about a week*, and then left. Some were dressed in gray, and some in short jackets with little peaks behind, with black buttons. She saw them seven or eight times during one week, and then they all left, and *she never saw any of them at any other time except during that week*. That *Andrew Gwynn's* name was the only one she heard; that *Mary Sims* used to tell her, when the men were there, the names of others, but she had forgotten them.

That these five witnesses all refer to the same party of men and the same year is certain, from the fact that Elzee Eglen says that *Mary Sims* carried the party he describes as being there in the summer of 1863 their victuals, and that *Milo Sims* kept their horses in the stable; and *Melvina Washington* says *Mary Sims* used to tell her the names of the party which

he describes as being there in 1863; and also from the fact that all of them, except Milo Sims, named *Andrew Gwynn* as being one of the party. I will not waste the time of the Court in pointing out to it in detail the discrepancies in their evidence apparent from the foregoing synopsis of their testimony; and therefore, only calling its attention to the fact that all of these witnesses were living with Dr. Mudd during and after the year 1861, (Dyer,) down to the several dates given above, when they respectively left, I will proceed to show from the evidence *what* and *when* the occurrences really were about which they have testified.

1. Ben. Gwynn (named by Mary Sims as one of the party) says:

"Q. Will you state whether during last summer, in company with Captain White, from Tennessee, Captain Perry, Lieutenant Perry, Andrew Gwynn, and George Gwynn, or either of them, you were about Dr. Samuel A. Mudd's house for several days? A. I was not. I do not know any of the parties named, and I never heard of them, except Andrew Gwynn and George Gwynn.

Q. Were you with your brothers, Andrew Gwynn and George Gwynn, about Dr. Mudd's house last year? A. No, sir. I have not been in Dr. Mudd's house since about the first of November, 1861. I have not been on his place, or nearer his place than church, since about the 6th of November, 1861.

Q. Where did you and the party who were with you near Dr. Mudd's sleep? A. We slept in the pines near the spring.

Q. How long were you there? A. Four or five days. I left my neighborhood, and went down there and stayed around in the neighborhood—part of the time at his place, and part of the time elsewhere. He fed us there—gave us something to eat, and had some bed-clothing brought out of the house. That was all."

He further said, that the party was composed of his brother, Andrew Gwynn, and Jerry Dyer, who, on the breaking out of the war, were, like all the people of that section, panic-stricken, and apprehending arrest; that he came up to Washington on the 10th of November, gave himself up, found there were no charges against him, took the oath, and went back home. That John H. Surratt, when this party were there, was at college, and witness never saw him in Charles county then or since. That his brother, *Andrew Gwynn*, went South in the fall of 1861, and was never, to his knowledge, back in that county but once since, and that was last winter sometime. He corrected his statement as to *when* the party were there, and fixed it in August, 1861.

2d. Jerry Dyer, brother-in-law of the accused, testifies to the same as Ben. Gwynn. Says he and the two Gwynns were members of companies organized by authority of Governor Hicks for home protection in 1860; were present on parade in Washington at the inauguration of a statue, on

the 22d of February, 1860. When the war broke out the companies were disbanded; many of the members going South, and many of those who remained in Charles county scattering about from rumors of arrests; that there was a general panic in the county then, and almost everybody was leaving home and "dodging about;" that while he and the two Gwynns slept in the pines these three or four days, Mary Sims carried them victuals from the house, and Milo Sims attended to the horses in Mudd's stables; that they were dressed in citizens' clothing; that Andrew Gwynn went South in the fall of 1861; witness never heard of his being back since; that Surratt was not there then, nor, so far as he knows, since.

3d. William Mudd, a near neighbor of the accused, named by Mary Sims as having seen the party she describes, says he saw Benjamin Gwynn there in 1861, but saw none of the others, then or since.

4th. Albin Brooke, referred to by Mary Simms and Rachel Spencer as having seen the party they describe, (and by Mary Sims as having seen Surratt especially,) says he knows Surratt, having met him in another county once, and knew Benjamin Gwynn and Andrew Gwynn, but that he never saw Surratt with any of the men named by Mary Sims at Dr. Mudd's, nor heard of his having ever been there; never heard of Andrew Gwynn being back from Virginia since 1861. That he lived at Dr. Mudd's from the 1st of January to between the 1st and the 15th of September of last year, and was at the stable morning, noon, and night, each day, and was about the spring daily; while there never saw any strangers' horses in the stable, nor any signs about the spring of persons sleeping there; but that, while living near Dr. Mudd's, in the summer of 1861, he knew of Ben. and Andrew Gwynn and Dyer sleeping in the pines there.

5th. Mrs. Mary Jane Sims boarded, or was a guest, at Dr. Mudd's all last year, except through March; knew Andrew, Ben., and George Gwynn, and John H. Surratt. Never saw or heard of any of them there, nor of any of them sleeping in the pines.

6th. Frank Washington (colored) lived at Dr. Mudd's all last year; knew Andrew Gwynn by sight; never saw or heard of him or Surratt, (of whom a photograph was shown him,) or of any of the men named by Mary Sims, being there, or of any men being there in uniform; at the stable three times daily, and often at the spring, and saw no strange horses in the stable; saw no signs of men sleeping about the spring.

7th. Baptist Washington, carpenter, at work there putting up kitchen, &c., from February till Christmas last year, except the month of August; same as above, except as to knowledge of Andrew Gwynn. (Photograph of Surratt shown him.)

8th. Charles Bloyce, (colored,) at Dr. Mudd's through every Saturday and Sunday all last year, except from 10th April to 20th May; same as Frank Washington, except as to knowing Andrew Gwynn.

9th. Julia Ann Bloyce, (colored cook,) there from early in July to 23d December, 1864; same, substantially, as Frank Washington; knew Ben. and Andrew Gwynn. (Photograph of Surratt shown with-ss.)

10th. Emily Mudd and Fanny Mudd live on adjoining farm to Dr. Mudd, at his father's; at his house almost daily for years; knew of the party in the pines in 1861. composed of Dyer and the two Gwynns; knew Andrew Gwynn well; never heard of his being back from Virginia since 1861, nor of Surratt ever being at Dr. Mudd's, nor of any of the others named by Mary Sims, except the Gwynns, in 1861.

11th. Henry L. Mudd, Jr., brother of the accused, living at his father's; same as above as to Surratt.

None of the five witnesses, whose testimony has been shown false in all essential parts by the evidence of the twelve witnesses for defence, referred to above, said that Surratt was one of the party sleeping in the pines, except Mary and Milo Sims. These two witnesses are shown to have established reputations as liars, by the evidence of Charles Bloyce, Julia Ann Bloyce, and Frank, Baptist, and Betty Washington. So all that testimony for the prosecution, of the "intelligent contrabands," who darkened the counsels of the court in this case, is cleared away. The only part of it at all admissible under the rules of evidence, or entitled to the consideration of the Court, was that showing Surratt was intimate with Mudd, and often at his house last year and year before; and that, like nearly all the rest of their testimony, has been conclusively shown to be false.

Another witness, who testifies to implicate Mudd as an associate of Surratt, is William A. Evans, who said he saw Mudd some time last winter enter a house on H street, just as Judson Jarboe, of Prince George's county, was going out of it; and that Jarboe was then shaking hands with a young lady, whom witness took to be a daughter of Mrs. Surratt, from her striking likeness to her mother, he having known or seen all the family; and that he stopped a policeman on the street, and asked whose house it was, and he said, "Mrs. Surratt's;" and that he drove up to the pavement, and asked also a lady who lived near by, and she said the same. He said this house was between Eighth and Ninth, or Ninth and Tenth—he was not perfectly certain as to the streets, but *was certain* it was between the Patent Office and the President's. Through an hour's cross-examination, he fought by equivocation, or pleading defect of memory, against fixing any circumstance by which I could learn directly or indirectly the day or the month when it occurred, and, finally, he could only say it was "sometime last winter." Although his attention had been so strongly attracted to the house, he first said it was on one side of the street and then on the other; and could not tell whether it had any porch or any portico, nor describe its color, nor whether it had a yard in front, nor whether it was near the centre of the square, nor describe a single house

on either side of the same square. He said he knew Dr. Samuel Mudd, having met him first at Bryantown church, in *December*, 1850.

Every material thing he did say, which was susceptible of being shown false, has been so shown.

1st. Mrs. Surratt's house is not between the Patent Office and the President's, but next the corner of Sixth. (Weichmann, Holahan, Miss Surratt.)

2d. Miss Surratt, an only daughter, says she never saw or heard of Samuel Mudd being at her mother's house, nor heard his name mentioned in the family, and never met Judson Jarboe there or elsewhere before the assassination.

3d. Miss Fitzpatrick, who boarded at Mrs. Surratt's from the 6th of October last to the assassination, and Holahan, who was there from the first week of February last, never saw either Mudd or Jarboe there, or heard of either being there, or the name of either mentioned in the family.

4th. Weichmann, who boarded there through last winter, never heard of Mudd being at the house.

5th. Judson Jarboe says he never was at Mrs. Surratt's house, or met Dr. Mudd or Miss Surratt in Washington before the assassination.

6th. Mary Mudd says Samuel Mudd was at Frederick College, at Fredericktown, Maryland, in December, 1850, and was not at home during the collegiate year, beginning in September of that year; and Rev. Dr. Stonestreet, who was president of that college until December of that year, testifies the accused was then entered as a student there, and could not by the rules of the college have gone home.

This witness, Evans, boasted often to the Court that he was a minister of the Gospel, and reluctantly admitted on cross-examination that he was also one of the secret police. In his reckless zeal as a detective, he forgot the ninth commandment, and bore false witness against his neighbor. It is to be hoped his testimony that he is a minister of the Gospel is as false as his material evidence. I feel bound in candor to admit, however, that his conduct on the stand gave an air of plausibility to *one* of his material statements—that for a month past he has “been on the verge of insanity.”

I have now presented and considered all the testimony going to show that Mudd ever met Surratt at all, and all that he ever met Booth, before the assassination and after the first visit Booth made to Charles county—except the testimony of Weichmann, which I will now consider.

That witness says that about the middle of January last, he and Surratt were walking down Seventh street one night, and passed Booth and Mudd walking up the street, and just after they had passed, Mudd called “Surratt, Surratt.” Surratt turned and recognized Mudd as an old acquaintance, and introduced Mudd to witness, and then Mudd introduced Booth to witness and Surratt. That soon after the introduction Booth invited

them all to his room at the National Hotel, where wine and cigars were ordered. That Dr. Mudd, after the wines and cigars came, called Booth into the passage, and they stayed there five to eight minutes, and then both came and called Surratt out, and all three stayed there about as long as Mudd and Surratt had stayed, both interviews together making about ten to twenty minutes. On returning to the room, Dr. Mudd seated himself by witness, and apologized for their private conversation, saying, "that Booth and he had some private business—that Booth wished to purchase his farm." And that, subsequently, Booth also apologized to him, giving the same reason for the private conversation. Booth at one time took out the back of an envelope, and made marks on it with a pencil. "I should not consider it writing, but more in the direction of roads or lines." The three were at that time seated round a centre table in the middle of the room. "The room was very large—half the size of this court room." He was standing when this was done within eight feet of them, and Booth was talking in a low tone, and Surratt and Mudd looking on the paper, but witness heard no word of the conversation. About twenty minutes after the second return from the passage, and after a good deal of general conversation, they all walked round to the Pennsylvania House, where the accused sat with witness on a lounge, and talked about the war, "expressed the opinion that the war would soon be over, and talked like a Union man." Soon after getting there, Booth bid the accused good night, and after Booth left, witness and Surratt followed, at about half-past ten o'clock.

It will be observed that the only men spoken of by this witness as having seen the accused on this occasion are Booth, who is dead, and Surratt, who is a fugitive from the country. So there is no one who can be called to confirm or confute his statements, as to the fact of these men being together, or as to the character of the interview. But there was *one fact* about which he said he could not be mistaken, and by means of which his evidence against Mudd is utterly overthrown. That is, he alleges the meeting was about the middle of January, and fixes the time with certainty by three distinct circumstances:

1st. He made a visit to Baltimore about the middle of January, and near the date of this meeting.

2d. He had, *before the meeting*, got a letter, which he received on the 16th of January.

3d. It was after the Congressional holidays, and Congress had resumed its session. He recollects this fact of itself, and is confirmed in his recollection by the fact that Booth's room was one a member of Congress had occupied before the holidays, and which was given Booth, as he learned, until the member, who had been delayed beyond the time of the reassembling of Congress, should return. Booth told him this.

In refutation of this evidence, we have proved, beyond all controversy, that Dr. Mudd was not in Washington *from the 23d of December to the 23d of March.*

On the 23d of December he came to Washington with J. T. Mudd, who says they left their horses at the Navy Yard, and went into the city at dark, on the street cars, and registered at the Pennsylvania House. They then went out and got supper at a restaurant, and then went to the Metropolitan Hotel and stayed there together a quarter of an hour, and then to the National, where witness met a friend, and became separated in the crowd from accused. Witness strolled out and went back to the Pennsylvania House, to which accused returned in a few minutes after he got there. He saw and heard no one with the accused, though there *might* have been persons with him in the front part of the room, (which was separated from where witness sat by open folding doors,) without witness seeing them. Witness and accused then went to bed; were together all next day; were about the market together, and at the store making purchases; were not at the National Hotel, and left the city about one o'clock in the afternoon of the 24th, and returned home together. Witness never saw Booth, except on his visit to Bryantown in November. We have shown by the evidence of Lucas, Montgomery, Julia Bloyce, and Jerry Mudd, that accused came here on that visit on a sufficient and legitimate business errand—to purchase a cooking-stove and other articles, which he bought here then.

On the 23d of March, Lewellyn Gardiner said accused again came to Washington with him to attend a sale of condemned horses, but that the sale did not occur at that time. They got to Washington at 4 or 5 p. m., left their horses at Martin's, beyond the Navy Yard, and went about looking at some wagons for sale, and went then to the Island to the house of Henry Clark, where they took tea. They spent the evening at Dr. Allen's playing whist; slept together that night at Clark's, and after breakfast next morning went through the Capitol looking at the paintings in the Rotunda, and returned to Martin's at dinner, and after dinner left and returned home. Accused was not separated from or out of sight of witness five minutes during the whole visit, and did not go to any of the hotels or to the post office, or see or inquire for Booth. Dr. Allen, Clark, Martin, Thomas Davis, Mary Mudd, Henry Mudd, and Betty Washington, confirm witness as to the objects or incidents of the visit.

On the 11th of April, three days before the assassination, while Booth, as appears by the hotel register, was at the National in this city, accused came to Giesboro to attend the sale of Government horses, which he and Lewellyn Gardiner had come on the 23d of March to attend. Though in sight of Washington, he did not come into the city, but took dinner at Martin's, and after dinner left and returned home. On this visit he stayed

all night at Blanford's, twelve miles from the city coming up, but not returning. (Lewellyn Gardiner, Henry L. Mudd, Dr. Blanford, Martin, Davis, Betty Washington, Mary Mudd.)

On the 26th of January he went with his wife to the house of his neighbor, George H. Gardiner, to a party, and stayed till daylight. (Betty Washington, Thomas Davis, Mary Mudd.) Except for one night on the occasion of each of those four visits—two to Washington, one to Giesboro, and one to Gardiner's—accused was not absent from home a night from 23d December until his arrest. (Betty Washington, Thomas Davis, Henry L. Mudd, Mary Mudd, Frank Washington.)

After the evidence for the defence above referred to had been introduced, refuting and completely overwhelming Weichmann's testimony and all inferences as to Dr. Mudd's complicity with Booth which might be drawn from it, a new accuser was introduced against him on the same point in the person of *Marcus P. Norton*, who said that at half-past 10 o'clock, on the morning of the 3d of March, as he was preparing his papers to go to the Supreme Court to argue a motion in a patent case there pending, (which motion the record of the Court shows he *did* argue on that day,) a stranger abruptly entered his room and as abruptly retired, saying he was looking for Mr. Booth's room; and though witness never saw Dr. Mudd before or since, until the day of his testifying, he says that stranger is the prisoner at the bar. He could not tell any article of the stranger's clothing except a black hat. *Wm. A. Evans*, a part of whose evidence we have hereinbefore considered, comes to the support of Norton, by saying that early on the morning of either the 1st, or 2d, or 3d of March, (witness is certain it was one of those three days,) Dr. Mudd passed witness on the road from Bryantown to Washington, a few miles from the city, driving a two-horse rockaway, and there was a man in with him, but whether a black or a white man witness could not recollect. Fortunately for the accused, the 1st day of March was Ash Wednesday—the first day of Lent—a religious holiday of note and observance in the community of Catholics among whom he lived. Fortunately for him, too, his sister Mary was taken ill on that day, and required his medical attendance (at her father's house, on the farm adjoining his own, thirty miles from Washington) each day from the 2d to the 7th of March, inclusive. By the aid of these two circumstances we have been able to show by Thomas Davis that accused was at home at work on the 28th of February, (the day before Ash Wednesday;) by Dr. Blanford, Frank Washington, and Betty Washington, that he was there at work at home on the 1st of March; by Mary, Fanny, Emily and Henry L. Mudd, Betty and Frank Washington, and Thomas Davis, that he was there on the 2d, 3d, 4th, and 5th of March, at various hours of each day. At or within two hours of the time when Norton says

He saw the accused enter the room at the National, (10½ A. M., 3d of March.) Mary, Emily, Fanny, and Henry L. Mudd, Frank and Betty Washington, Thomas and John Davis, all testify most emphatically to having seen him at his house, on his farm, or at his father's house adjacent to his own—six hours' ride from Washington! We have shown, too, by Mary Mudd, that the accused has always worn a lead-colored hat whenever she has seen him this year, and that she has seen him almost daily; and by Henry Mudd, Dr. Blanford, and Mary Mudd, that neither he nor his father owns a rockaway. Now, Norton either saw the accused enter his room on the morning of the 3d of March or not at all, for his evidence, clinched as to the date by the record of the Supreme Court, excludes the supposition that he *could* have been mistaken *as to the day*. Nor can these eight witnesses for the defence be mistaken as to the day, for the incidents by which they recollect Mudd's presence at home fix the time in their memories exactly. With all this evidence before the Court, it cannot hesitate to hold the *alibi* established beyond all cavil.

The only other item of evidence as to anything done or said by Dr. Mudd, or by anybody, before the assassination, tending in the least to show him implicated in the conspiracy, is the evidence of *Daniel J. Thomas*, who says that several weeks before the assassination he met Mudd at the house of his neighbor, Downing, and there, in the course of conversation, Mudd said (laughingly) that "Lincoln and his whole Cabinet, and every Union man in the State of Maryland, would be killed within six weeks." Witness said he wrote to Col. John C. Holland, provost marshal of that district, at Ellicott's Mills, before the assassination, advising him of Mudd's statement. But Col. Holland says he got a letter from witness about that time, and there was not a word of the statement in it, nor a reference to the accused, nor to any statement by anybody about killing anybody. Thomas says he told his brother, Dr. Thomas, of the declaration before the President was killed, but his brother says emphatically he did not tell him until after Mudd's arrest—the boot found at Mudd's house having been named in the same conversation. Thomas says he told Mr. Downing about it before the assassination, but Downing says emphatically he did not tell him a word about it *at any time*. Downing also says that he himself was present every moment of the time Mudd and Thomas were together at his house, and heard every word said by either of them, and Mudd did not make that statement, nor refer to the President, or the Cabinet, or the Union men of Maryland, at all, nor say a word about anybody being killed. He says, however, Mudd, when Thomas was bragging and lying about being a provost marshal, did tell him, "he was a jack"—which insult was doubtless an incentive to the invention of the calumny. But it was not the *only* incentive. Thomas knew that if that lie could be palmed off on the Judge

Advocate and the Court for truth, it might lead to Mudd's arrest and conviction as one of the conspirators. He had, on Tuesday, before Mudd's arrest, and before this lie was coined and circulated, been posting handbills, containing the order of the War Department offering liberal rewards for any information leading to the arrest of Booth's accomplices, and he then, doubtless, conceived the idea of at once getting reward in money from the Government for his information, and revenge on Mudd for his insult in Downing's house.

That he gave that evidence corruptly is shown by Wm. Watson, John R. Richardson, and Benjamin Naylor, who say that Thomas, after testifying against Mudd, went to see them, and said, that "*if Dr. Mudd was convicted upon his testimony, he would then have given conclusive evidence that he gave the information that led to the detection of the conspirator!*" "*He then asked Mr. Benjamin J. Naylor if he did not mention to him and Gibbons, before the killing of the President, the language that Dr. Mudd had used. Mr. Naylor said that he had never done it, before or after!*" "*He said his portion of the reward ought to be \$10,000—and asked me (Watson) if I would not, as the best loyal man in Prince George's county, give him a certificate of how much he ought to be entitled to.*" The testimony of Richards, and of Eli J. Watson, coupled with Thomas's testimony in denial of these statements, fill the record of infamy of this false witness.

To accumulate evidence that Thomas's statement is utterly unreliable, the defence brought over twenty of his neighbors, who testified that he could not be believed on oath—among whom were Naylor, Robey, Richards, Orme, Joseph Waters, John Waters, J. F. Watson, Eli Watson, Smith, Baden, Dickens, Hawkins, Monroe, and others, of undisputed loyalty, nearly all of whom had known him from boyhood. His brother, Dr. Thomas, testifies that he is at times deranged; and Dr. Geo. Mudd says he is mentally and morally insane. And, although Thomas's evidence was the most important in the case against Dr. Mudd, the Judge Advocate has not seriously attempted to sustain him—has not tried to show that he ever told or hinted at this story to anybody before the assassination—and has not asked one of the scores of witnesses for the prosecution in attendance from Thomas's neighborhood a question as to his reputation for veracity—except Wm. Watson, who said it was decidedly *bad*. A feeble attempt was made to sustain him, by endeavoring to show that he was a zealous supporter of the Administration, and that, *therefore*, the general voice of his community was against him. But we showed he was a rebel at the beginning of the war, and an opponent of the Administration at the last election—and then the Judge Advocate dropped him!

This is all the evidence of every act or word done or said by anybody, prior to the assassination, tending in the remotest degree to connect Mudd

with the conspiracy. It consists, in large part, of the testimony of the five negroes, as to the Confederate officers frequenting Mudd's house last year and the year before—two of them, Milo and Mary Sims, as to Surratt's visiting his house last year—of Evans as to Mudd's going to Surratt's house last winter—of Evans and Norton as to Mudd being here on the 2d of March—of Weichmann as to the interview between Mudd, Booth, and Surratt, about the middle of January—and of Thomas as to Mudd's prediction of the assassination in March. I venture to say, that rarely in the annals of criminal trials has the life of an accused been assailed by such an array of false testimony as is exhibited in the evidence of these nine witnesses—and rarely has it been the good fortune of an innocent man, arraigned and on trial for his life, to so confute and overwhelm his accusers. I feel it would be a waste of time and an imputation on the intelligence of the Court to delay it with fuller discussion of the evidence of these witnesses—and feel sure it will cast their testimony from its deliberations, or recollect it only to reflect how foully and mistakenly the accused has been assailed.

Having now discussed all the evidence adduced that calls for discussion, or may by possibility be relied on as showing Mudd's acquaintance with Booth, or connection with the conspiracy, and having, I think, shown that there is no reliable evidence that he ever met Booth before the assassination but once on Sunday, and once the day following, in November last, I will proceed to a consideration of the testimony relied on to show that he knowingly aided the escape of the assassin.

First—Why did Booth go to Dr. Mudd's and stop there from daybreak till near sundown on his flight? I answer, because he had a broken leg and needed a physician to set it. And as to the *length* of the stay, the wonder is he was able to ride off on horseback with his broken and swollen limb at all—not that he took ten hours' rest. The Court will observe, from the map in evidence, that Booth, taking Surrattsville in his route to Pope's Creek, opposite Matthias Point, where he crossed the Potomac, (Captain Doherty,) travelled at least eight or ten miles out of his way, to go, after leaving Surrattsville, by Dr. Mudd's. (See Dyer's testimony.) Would he have gone that far out of his route to the Potomac crossing if he had not broken his leg? Or was it part of his plan to break it? Obviously, he could not in advance have planned to escape by crossing the *potarent*, nor to evade his pursuers by lying concealed in Charles county, within six hours' ride of Washington. He must, as a sane man, have contemplated and planned escape across the Potomac into Virginia, and thence South or abroad; and it could never have been part either of the plan of abduction, or of that of assassination to go the circuitous route to a crossing of the Potomac by Bryantown or Dr. Mudd's. So that the fact of Booth going to the house of the accused, and stopping to get his leg set and to rest, does not necessarily lead to any conclusion unfavorable to the accused.

Booth got there, with Herold, about daybreak, (Frank Washington.) He usually wore a moustache, (see photograph,) but he then wore heavy whiskers, and had his face muffled in a shawl, so as to disguise him. The disguise was kept up all day. (Col. Wells.) He was taken to a lounge in the hall, and then to a front room up stairs, where the broken bone was set, where a fee of \$25 was paid for the service, and where, it is probable, he slept most of the day. They represented that the leg had been broken by a fall of the horse; that they had come from Bryantown, and were going to Parson Wilmer's. After breakfast accused went to his field to work. Herold, whom Mudd had never met, (Col. Wells,) came down to breakfast and dinner with the family, and after dinner he and Mudd went off together to the house of Mudd's father, to get a family carriage to take the wounded man to the house of Parson Wilmer, five miles off, at Piny Chapel. (Lovett Wells.) Now, can any man suppose for a moment that Mudd, at this time, had the slightest suspicion or intimation of the awful tragedy of the night before? Could he, knowing or suspecting the crime or the criminal, have thus recklessly given himself up to arrest and trial, by publicly aiding the escape of the assassin? Could he have been ready to expose his old father to suspicion by thus borrowing his carriage, which would have been noticed by every man, woman and child on the road, to carry off the assassin? Impossible! I need nothing more of the Court than its consideration of this fact, to clear the accused of all suspicion of having, up to that time, known or suspected that a crime had been committed by the crippled stranger, whom he was thus openly and kindly seeking to aid.

But the carriage could not be got, and Mudd and Herold rode off towards Bryantown to get one there. Colonel Wells thinks the accused told him that Herold turned back when getting one and a half miles from the elder Mudd's house, saying he could take his friend off on horseback. Betty Briscoe and Eleanor Boyce, however, say they saw a man riding towards Bryantown with the accused, who turned back at the bridge at the edge of the town.

Mudd made some purchases of calico and other articles, and heard of the assassination. (Bean.) It was not generally known then among the citizens who was the assassin. (Bean, Roby, Trotter, B. W. Gardiner, M. L. McPherson, John McPherson.) In fact it was not generally known with certainty at the theatre, or in Washington, Friday night, whether Booth was the murderer. (Gobright.) In Bryantown it was commonly understood that Boyle, a noted desperado of that region, who assassinated Captain Watkins last fall, was one of the assassins. (M. L. McPherson, Bean, Trotter, Roby.) It was not known that the murderer had been tracked into that neighborhood. (Bean, Dr. George Mudd.) Lieutenant Dana told Dr. George Mudd, Saturday afternoon, that Boyle assassinated Mr. Seward

and Booth the President, but that he thought Booth had not then got out of Washington. Even next day (Sunday) it was reported there that it was *Edwin* Booth who killed the President.

The accused left Bryantown about four o'clock to return home. *Betty Briscoe* says the same man who had turned back at the bridge stopped in the edge of a branch, which the road crosses a couple of hundred yards from the bridge, until Mudd returned from town, and then they rode off together across the branch, "up the road." But *Booz* says he saw Mudd a couple of hundred yards beyond that crossing leisurely going through the farm *Booz* lives on, by a near-cut which he usually travelled, *alone*; and that he would himself have probably noticed the man at the crossing, which was in full view of where he was, had he been waiting there; and would have *certainly* noticed him had he been with Mudd travelling the main road, when Mudd turned into the cut-off through the farm—but he saw no one but the accused. *Susan Stewart* also saw Mudd in the by-road returning home alone, and did not see any man going the main road, which was in full view. I call the attention of the Court to the plat by which the branch and these roads are shown, and to the fact that there is no road turning off from the main road between *Booz's* place and Bryantown, except the side road by *Booz's* house. If further refutation of the testimony of *Betty Briscoe* on this point be required, it is found in the evidence of *Primus Johnson*, who saw Herold pass the elder Mudd's in the main road, going towards the house of the accused, and sometime after that, himself caught a horse in the pasture, and rode towards Bryantown, and met and passed Dr. Mudd coming leisurely from Bryantown, *alone, at Booz's farm*; and that from the time he saw Herold until he met and passed Mudd was full an hour and a half. And in the evidence of *John Acton*, who was on the roadside, three miles from Bryantown, when Herold passed, at between three and four o'clock, and who remained there an hour, and Dr. Mudd did not go by in that time. Acton also says, that, between the time Herold and Mudd went towards Bryantown and the time Herold returned alone, was but three-quarters of an hour. From the fact that Herold could not have ridden to the bridge and back in that time, (six miles,) it seems highly probable that he did not go to the bridge, but turned back about where Colonel Wells thinks Mudd said he did. But however that may be is not important, as it is certain from the evidence of these four witnesses that Herold did not wait at the branch for Mudd's return from Bryantown.

As Mudd rode home, he turned out of his way to see his neighbor, *Hardy*, (who lives half-way between the house of the accused and Bryantown,) about some rail-timber he had engaged there. The house is not in view of the road, a clump of pines intervening. He told Hardy and Farrell of the news. Hardy says:

"He said to me that *there was terrible news now*, that the President and

Mr. Seward and his son had been assassinated the evening before. Something was said in that connection about Boyle (the man who is said to have killed Captain Watkins) assassinating Mr. Seward. I remember that Booth's name was mentioned in the same connection, and I asked him if Booth was the man who had been down there. His reply was that he did not know whether it was that man or one of his brothers; he understood that he had some brothers. That ended the conversation, except that he *said it was one of the most terrible calamities that could have befallen the country at this time.*

"Q. Did you say that it was understood or said that Booth was the assassin of the President? A. There was some such remark made, but I do not exactly remember the remark."

They both say he seemed heartily sorry for the calamity, and that he said he had just come from Bryantown, and heard the news there. Hardy says he stayed there only about ten minutes, and left just about sundown. Farrell corroborates Hardy as to the conversation, except that he reports nothing as to Boyle's name being mentioned; but he says the conversation was going on when he joined Hardy and Mudd. He says the house is less than a quarter of a mile off the road, and that accused stayed there about fifteen minutes.

Now, I ask the Court, what is there up to this point to indicate that Mudd knew or had any suspicion that the broken-legged man was implicated in the crime? If there is anything in proof showing that fact, I fail to find it. True, he had met Booth twice in November—five months before. Had seen him that dark, cloudy morning, at day-break, faint with fatigue and suffering, muffled in his shawl and disguised in a heavy beard; had ministered to him in the dim light of a candle, whose rays struggled with the dull beams of the opening day: had seen him, perhaps, sleeping in the darkened chamber, his moustache then shaved off, his beard still on, his effort at concealment still maintained. (Wells.) And here let me remind the Court, that there is nothing in the evidence showing that Booth *spoke a word*—but where either of the men are referred to as saying anything, "the smaller man" was the spokesman. Let it be remembered too that Booth was an actor, accustomed by years of professional practice to disguise his person, his features, and his tones—so that if Mudd had been an intimate associate, instead of a mere casual acquaintance, it would have been easy for Booth to maintain a disguise even when subjected to close scrutiny under circumstances favorable to recognition. If the Court will also consider with what delicacy a physician and a gentleman would naturally refrain from an obtrusive scrutiny of a patient coming to his house under the circumstances, they will appreciate how easy it was for Booth to avoid recognition, and how probable that Mudd had no suspicion who his patient was. Had he recognized Booth before he went to Bryantown, and heard

there that name connected with the "terrible calamity," would he have jogged quietly home, stopping to chat with Booz, to look after his rail-timber, to talk of the names of the assassins with his neighbors? Unless the Court start out with the hypothesis of guilt, and substitute unsupported suspicion for proof—which I respect them too highly to fear for a moment they will do—they cannot charge him with a recognition of Booth before he returned home from Bryantown.

Hardy says it was about sundown when Mudd left; Farrell says about five o'clock. He had two miles to ride home. It must have been sundown when he got home, and the men had just gone. Betty Washington says that three or four minutes after Herold (the last of the two) disappeared towards the swamp, Mudd came through the hall to the kitchen, and was then first seen by her after his return from Bryantown. The other servants had not come from the field when the men started—and we are therefore left to that one witness to show that the statement of Simon Gavagan, one of the detectives, who says "*he thinks*" Mudd said he went with them part of the way, is incorrect. It is inconsistent, too, with Mudd's statement to Col. Wells on the subject, which is as follows: "The Doctor said that as he came back to the house he saw the person that he afterwards supposed to be Herold passing to the left of the house, and towards the barn or the stable; that he did not see the other person at all after he left him at the house, which was about one o'clock, I think." This statement, and that of Betty Washington, last above quoted, coincide with and strengthen each other.

It is true Dr. Mudd did say to all who asked him that he had shown Herold the way to Parson Wilmer's by the short route, but this was in the morning, soon after the parties reached the house, and before the idea of the carriage appears to have been suggested. This is shown by the statement of Colonel Wells, who says that the accused, *in the same conversation in which he said that Booth and Herold had just gone from the house as he came up*, told him that; "Herold, the younger of them, asked him the direct route to Piney Chapel, Dr. Wilmer's, saying that he was acquainted with Dr. Wilmer." He described the main travelled road, which leads to the right of his house, and was then asked if there was not a shorter or nearer road. He said, "Yes, there is a road across the swamp that is about a mile nearer, I think;" he said it was five miles from his house to Piney Chapel by the direct road and four miles by the marsh, and undertook to give him (as he said) a description by which they could go by the nearer route. He said that the directions were these: they were to pass down by his barn, inclining to the left, and then pass straight forward in a new direction across the marsh, and that on passing across the marsh they would come to a hill; keeping over the hill, they would come in sight of the roof of a barn, and letting down one or two fences they would reach the direct road."

The accused meant, of course, that this inquiry and explanation occurred before his return to the house from Bryantown—and so Col. Wells understood him, for he so in effect says. The statement of the accused to Dr. Geo. Mudd, the next day after Booth left, is to the same effect. He said: "That these parties stated that they came from Bryantown, and were inquiring the way to the Rev. Dr. Wilmer's"—thus putting their inquiry for the route to Parson Wilmer's in direct connection with their early explanation as to whence they came.

I have no doubt that Gavagan, the detective, recollects an *inference* which he, and perhaps also his associate detective, Williams, drew from Dr. Mudd saying that he had shown Herold the route to Parson Wilmer's, that he showed it as Booth and Herold were leaving. But the inferences of detectives, under the strong stimulus of prospective rewards, are inferences generally of guilt: and that these gentlemen were not free from the weaknesses of their profession, and that they grossly misrepresented Dr. Mudd in other important statements, will presently be shown to the satisfaction of the Court.

Now, if Mudd did not know, when he talked with Hardy about the assassination, and spoke of Booth in connection with it, that the assassin was at his house—as I think the evidence shows he did not—then when did he first suspect it? Col. Wells says his *inference* was, from something the accused said, that he suspected the crippled man to be Booth before he left the premises. The evidence not only shows that when Mudd returned Booth had gone out of sight, but it also shows what fact it was that, added to the undue excitement of the strangers, and to the fact that the crippled man shaved off his moustache, thoroughly aroused his suspicion. It was the fact that *his wife said to him, after they left, that as the crippled man came down to go his false whiskers became detached from his face.* (Lieut. Loyett.) When she told him this, and what he said or proposed to do, *was not* shown by the prosecution, and, by the rules of evidence, *could not be* by the defence. But that was a fact which could not probably have been communicated to Mudd by his wife until Booth had gone.

In the evidence adduced as to Mudd's subsequent conduct and statements, I need only call the attention of the Court to two points, for in it there is nothing else against him: 1st. He did not tell on *Tuesday* that the boot was there, far down in the leg of which was found by the officers "J. Wilkes," written in pale ink. I answer, the boot was not found by his wife until several days after the assassin left, and was then found in sweeping under the bed. (Hardy.) We have every reason to suppose it was not found until after Tuesday, for the accused, on Friday, before a question was asked or a word communicated to him, *told of the boot himself; and had it produced*, and said, in presence of his wife, it was found by her after the officers were there before. (Hardy.)

2d. Of the three detectives who went to the house of accused Tuesday, *Williams* says: Accused denied throughout that two men had been there; yet he says on cross-examination, that accused, in the same conversation, pointed out the route the men had taken towards Wilmer's. *Garacan* said he at first denied two men had passed there, and then admitted it. *Lloyd* says he denied it from beginning to end, on Tuesday. But *Lieut. Lovett*, who went with and in command of these detectives, speaking of this interview on Tuesday, says: "*We first asked whether there had been any strangers at his house, and he said there were.*" The three detectives are manifestly mistaken; either from infirmity of memory, or from some less pardonable cause, they have failed to recollect and truthfully render what Dr. Mudd did say on that subject.

The commentators upon the law of evidence give a caution which it may be well for the Court to observe. They admonish us how easy it is for a corrupt witness to falsify a conversation of a person accused, and as the accused cannot be heard, how difficult, if not impossible, contradiction is. How easy for an honest witness to misunderstand, or in repeating what was said to substitute his own language or inference for the language which was really used, and thus change its whole meaning and import. In no case can the caution be more pertinent than in this. The very phrenzy of madness ruled the hour. Reason was swallowed up in patriotic passion, and a feverish and intense excitement prevailed most unfavorable to a calm, correct hearing and faithful repetition of what was said, especially by the suspected. Again, and again, and again the accused was catechized by detectives, each of whom was vying with the other as to which should make the most important discoveries, and each making the examination with a preconceived opinion of guilt, and with an eager desire, if not determination, to find in what might be said the proofs of guilt. Again, the witnesses against the accused have testified under the strong stimulus of promised reward for information leading to arrests and followed by convictions. (See order of Secretary of War.) At any time and in any community an advertisement of rewards to informers would be likely to be responded to—at a time, and on an occasion like this, it would be a miracle if it failed of effect. In view of these considerations, the Court cannot be too vigilant in its scrutiny of the evidence of these detectives, or too circumspect in adjusting the influence to be given to it.

No more effective refutation of this statement, that Mudd denied on Tuesday that two strangers had been at his house, can be given, than to ask how came Lieut. Lovett and the detectives at Dr. Mudd's? They did not scent out the track for themselves. They were at Bryantown on Saturday and were at fault, and had they been let alone would probably have remained at fault, and not have gone to Dr. Mudd's. By whom and when was the information given which brought them there? The next morn-

ing after the startling news of the assassination reached him, the accused went to Dr. George Mudd, a man of spotless integrity and veracity, and of loyalty unswerving through all the perilous and distressing scenes of the border war, and fully informed him of all that had occurred—the arrival of the two strangers, the time and circumstances under which they came, what he had done for them, the suspicions he entertained, when they departed, and what route they had taken; and requested him, on his behalf and in his name, to communicate this information to the military authorities on his return that day to Bryantown. Dr. George Mudd *did* make the communication as requested, on Monday morning, to Lieut. Dana, and further informed him of Dr. Saml. Mudd's desire to be sent for for any further information which it might be in his power to give. In consequence of this, *and of this alone*, Lieut. Lovett and the detectives did, *on Tuesday*, go to the house of the accused, accompanied by Dr. George Mudd, who prefaced his introduction by informing the accused that, in accordance with his request, he had brought Lieut. Lovett and the detectives to confer with him in reference to the strangers who had been at his house Saturday. Of these facts there is no doubt or dispute. They stand too prominently upon the record to be ignored or evaded. But for this information the detectives would not have been at the house of the accused at all. They came at his request, and when they came it is absurd and idle to say that he denied, almost in the presence of Dr. George Mudd, who had been his messenger, and was then in the house, that the two strangers had been there. On the contrary, the evidence shows he imparted all he knew, and pointed out the route which the strangers took when they left—but which Lieut. Lovett and the detectives did not at once pursue, because they chose to consider his statement uncandid, and intended to put them upon a false scent. Indeed, so accurate was the description given by the accused to Lieut. Lovett, Tuesday, of the persons who had been at his house, that *the Lieutenant says he was satisfied, from Mudd's description, they were Booth and Herold.*

It was in great part by reason of Dr. Mudd's having delayed from Saturday night until Sunday noon to send to the authorities at Bryantown information as to the suspected persons who had been at his house, that he was arrested and charged as a conspirator; and yet I assert this record shows *he* moved more promptly in communicating his information than *they* did in acting on it. His message was communicated to Lieut. Dana Monday morning. *Tuesday*, Lieut. Lovett and the detectives came, and that officer got such information from Dr. Mudd as convinced him the suspected persons were Booth and Herold, and yet it was not until Col. Wells came, on *Saturday*, that an energetic effort was made to find the route of the assassin. On that day, Dr. Mudd himself went with that officer, and followed the tracks on the route indicated beyond the marsh into a piece

of ploughed ground, where the tracks were lost. But Col. Wells had got the general direction, and it was in consequence of the information sent by the accused to the authorities the day after Booth left his house that he was tracked to the Potomac.

But the evidence does not show that Dr. Mudd delayed at all in communicating his information, for it does not show *when* his wife told him of the false whisker of the crippled man. But, admit she told him on Saturday evening, as soon as the men left. It was four miles to Bryantown, and his wife may have feared to be left alone that night. Boyle, who haunted that neighborhood, was understood by Dr. Mudd to have been one of the assassins, (Hardy,) and may not his or his wife's fears of the vengeance of that desperado have prevented him communicating his suspicions *direct and in person* to the officer at Bryantown? He told Dr. George Mudd next day, when asking him to go to the authorities with the information, to caution them not to let it be publicly known that *he* had volunteered the statement, lest he might be assassinated in revenge for having done it.

Having thus presented and discussed somewhat in detail the testimony in this case, I now ask the indulgence of the Court while I briefly review some of its leading features.

Booth and Mudd met first in November last at church, near Bryantown, casually, and but for a few minutes. Their conversation was in presence of many others, including men of unquestioned loyalty. Next morning, Booth left Dr. Queen's, rode by Mudd's, talked of buying his farm, got him to show him over to Gardiner's, a quarter of a mile off, where he bought a horse, Mudd manifesting no interest in the purchase. They rode away together towards Mudd's house, and towards Bryantown, where Gardiner found Booth next morning at the village hotel. Booth was again at Dr. Queen's in the middle of December. But the evidence shows that he did not go into Mudd's neighborhood, or seek or see him. So far as we dare speak from the evidence—and we should dare speak from nothing else—that is all the intercourse between Mudd and Booth in that neighborhood before the assassination.

What was there in that to attract attention or excite remark towards Mudd more than to Dr. Queen or Mr. Gardiner, or any other gentleman in Charles county, to whom Booth had been introduced, and with whom he had conversed? All that is shown to have passed between them was perfectly natural and harmless, and nothing is to be presumed which was not shown. True, they *might* have talked of and plotted assassination; but *did* they? Is there, in the intercourse which had thus far occurred, any incident from which such a deduction could be drawn, or which would justify a suspicion that any such thing was thought of or hinted at? Nor did they ever meet again *anywhere* before the assassination, unless the testi-

mony of Weichmann is to be accepted as true, which, upon this point, at least, is quite unworthy of credence. He swears to having met Dr. Mudd and Booth in the City of Washington, about the middle of January—certainly after the holidays. But it is in proof by many witnesses, who cannot be mistaken, have not been impeached, and who unquestionably stated the truth, that Dr. Mudd was from home but one night from the 23d of December to the 23d of March, and that night at a party in his own neighborhood. If this be so, and there is no reason to doubt it, then Weichmann's statement cannot be true. The mildest thing that can be said of him, as of Norton, is, that he was mistaken in the man. That which was attempted to be shown by this contradicted witness (Weichmann) was, that Dr. Mudd and Booth, who were almost strangers to each other, met Sur-ratt, to whom Booth was unknown, at the National Hotel, and within half an hour after the meeting plotted the assassination of the President, his Cabinet, the Vice President, and General Grant—all this in Washington, and in the presence of a man whom one of the supposed conspirators knew to be an employee of the War Department, and had reason to believe was a Government detective! It is monstrous to believe any such thing occurred. It outrages all that we have learned of the philosophy of human nature, all that we know of the motives and principles of human actions. And yet, if Mudd was not then and there inducted into the plot, he never was. He never saw Booth again until after the assassination, and never saw any of the other conspirators at all. Twice, then, and twice only—unless the Court shall accept the testimony of Weichmann against the clear proofs of an *alibi*, and then only three times—he and Booth had met. None of these meetings occurred later than the 15th of January. They are shown to have been *accidental* and *brief*. The parties had but little conversation, and portions of that little have been repeated to the Court. So far as it has been disclosed, it was as innocent as the prattle of children, and not a word was breathed that can be tortured into criminality—not a word or an act that betokens malign purposes. Against how many scores of loyal persons, even in this community, may stronger evidence be adduced than against Mudd, if the mere fact of meeting and conversing with Booth is to be accepted as evidence of guilt? Booth was a guest at the National Hotel—intelligent, agreeable, of attractive manner, with no known blemish on his character as a man or a citizen. He had the *entree* of the drawing-rooms, and mingled freely with the throngs that assembled there. His society, so far from being shunned, was courted; and the fairest ladies of the land, the daughters of distinguished statesmen and patriots, deemed it no disparagement to them to accept his escort and attentions. It is not extravagant to say, that hundreds of true, Union-loving, loyal people in this and in other cities, were on terms of cordial and intimate association with him. And why should they not have been? He was under no sus-

picion. *They* did not shun him. Why should Mudd? And why shall what was innocent in them be held proof of guilt in him? Let it be remembered in this connection, that Dr. Mudd's house was searched and his papers seized; that Dr. Surratt's house was seized and searched; that all the effects of Booth, Atzerodt, Arnold, Herold, Spangler, and Mrs. Surratt, that could be found, were seized and examined; and that among them all not a letter, a note, a memorandum, not the scrape of a pen by any person or in any form, has been found implicating Dr. Mudd. Let it further be remembered, that all these persons have been subjected to repeated examinations, under appalling circumstances, by various officials of the Government, eager to catch the faintest intimation of Mudd's complicity, and that not one of them has mentioned or hinted at his name. Let it also be remembered, that anonymous letters have been picked up in railroad-cars, found in pigeon-holes at hotels, rescued from the waves, and that the continent has been traversed and the ocean vexed in search of proofs of the conspiracy, its instigators, leaders, and abettors, and that in all this written and oral testimony there is not a word making the remotest allusion to Dr. Mudd. The probabilities are as a thousand to one that he never knew, or heard, or imagined, of a purpose, much less plotted in a conspiracy, either to capture or to assassinate the President. There is not only a failure to show his connection affirmatively, but, if the rules of law be reversed, and guilt presumed until innocence be shown, then, I say, he has carried his proofs in negation of complicity to a point as near demonstration as it is possible for circumstantial evidence to reach. I once more concede, that (if the Court accept Weichmann's statement) it is *possible* he may have talked treason and plotted assassination with Booth and Surratt, but it is indefinitely removed from the probable; and neither liberty nor life is to be forfeited upon either probabilities or possibilities. I cannot bring myself to fear that this Commission will sanction what, in my judgment, would be so shocking and indefensible a conclusion.

If he and Booth had, at the alleged meeting in January, confederated for the perpetration of one of the most stupendous and startling crimes in the annals of human depravity, who can doubt that frequent meetings and consultations would thereafter have occurred, and that ~~they~~ they would have increased in frequency the as time for the consummation of the atrocious plot approached? Yet, though within six hours' ride of each other, they had no meetings, no consultations, no intercourse, no communication, no concert, but were in total ignorance of each other's movements and purposes. Mudd was here the 23d of March, but he was not here for the purpose of seeing Booth, nor did he see him. He made no inquiry for him; did not call at his hotel; saw none of his associates; did not speak of him; did not, so far as appears, even think of him. On the 11th of April, only three days before the frightful tragedy was enacted, Mudd was at Giesboro,

in sight of Washington. Booth was then at the National Hotel; and if Mudd was leagued with him, that was the time of all others, from the conception to the consummation of the deed, when he would have seen and conferred with him. If Mudd was a conspirator, he knew of Booth's presence here then; yet he did not come to the city—did not inquire for Booth, see him, hold communication with him, learn whether he was in Washington or Boston, Nassau or London. Three days only before the frightful tragedy—three days before the world was astounded by its enactment! Imagine, if you can—if he was a conspirator—what a tumult of thought and emotion must have agitated him then—what doubts and misgivings—what faltering and rallying of resolution—what invocations to “stop up the access and passage to remorse”—and then ask your own hearts and judgments if it is natural, or possible, that, at such a moment and under such circumstances, he could quietly have transacted the business that brought him to Giesboro, then turn his back upon Washington, indifferent to the failure or success of the events with which his own life, the happiness of his family, and all that was dear to him on earth, were bound up? If a conspirator, he knew what had been, and what was to be, done. He knew that the hour for the bloody business was at hand, and that everything depended upon the secrecy and success of its execution. Yet he was indifferent. He sought no interview with his supposed confederates—gave them no counsel or assistance—took no precautions for security—gave no signs of agitation or concern—but, in sight of the place and the agents selected for the enactment of the horrible deeds, turned his back upon them all, with an indifference that bordered upon idiocy, quietly trafficked at Giesboro, and returned to the seclusion of his family and farm. You know, gentlemen, that this is impossible. You know that it could not have happened without outraging every law of human nature and human action. You know that at such an hour his soul would have been shaken with the maddest storm and tempest of passion, and that no mere business affair on earth could have seduced his thoughts for a moment from the savage slaughter he had in hand. It would have engrossed all his thoughts, and shaped all his actions. No one can, in the strong light of the evidence, believe he *was* a conspirator.

I then confidently conclude that Dr. Mudd cannot be convicted as a principal in the felony. He did not participate in its commission, and was more than thirty miles distant from the scene when it was committed. He cannot be convicted as an accessory before the fact, for the evidence fails to show that he had any knowledge or suspicion of an intention to commit it. If, then, he is to be held responsible at all, it is an accessory after the fact. Does the evidence implicate him in that character? What is an accessory after the fact?

An accessory after the fact is when a person, knowing a felony to have

been committed, receives, relieves, comforts, or assists him whom he knows to be the felon. He must know that the felon is guilty to make him an accessory. (1 Chit. Crim. Law, 264.)

Any assistance given to him to hinder *his being apprehended*, tried, or punished, is sufficient to convict the offender—as lending him a horse to escape his pursuers; but the assistance or support must be given in order to favor an illegal escape. (1 Chit. Crim. Law, 265.) If a man receives, harbors, or otherwise assists to elude justice, *one whom he knows to be guilty of felony*, he becomes thereby an accessory after the fact in the felony. (1 Bishop's Crim. Law, 487.) Obviously, a man to be an accessory after the fact *must be aware of the guilt of his principal*; and, therefore, one cannot become an accessory by helping to escape a prisoner convicted of felony, *unless he has notice of the conviction, or at least of the felony committed*. (1 Bishop's Crim. Law, 488.) The charge against an accessory consists of two parts: First, of the felonious situation of the principal; and, secondly, of the guilty knowledge and conduct of the accessory. It will thus be seen that *knowledge of the crime committed, and of the guilt of the principal who is aided*, and aid and assistance *after acquiring that knowledge*, are all necessary to charge one as accessory after the fact.

Now, let us apply the facts to the law, and see whether Dr. Mudd falls within the rule. On the morning after the assassination, about daybreak, Booth arrived at his house. He did not find the doctor on watch for him, as a guilty accomplice, expecting his arrival, would have been, but he and all his household were in profound sleep. Booth came with a broken leg, and his companion, Herold, reported that it had happened by the fall of his horse, and that they had come from Bryantown, and were going to Parson Wilmer's. The doctor rose from his bed, assisted Booth into the house, laid him upon a sofa, took him up stairs to a bed, set the fractured bone, sent him a razor to shave himself, permitted him to remain there to sleep and rest, and had a pair of rude crutches improvised for his use. For all this he received the ordinary compensation for services rendered to strangers. He then went to his field to work. After dinner, while the day was still dark, and Booth still resting disguised in his chamber, Mudd left the house with Herold. Even though he had known of the assassination, and that his patient was the assassin, none of these acts of assistance would have made him an accessory after the fact. "*If a person supply a felon with food, or other necessities for his sustenance, or professionally attend him sick or wounded, though he know him to be a felon, these acts will not be sufficient to make a party an accessory after the fact.*" (Wharton's American Criminal Law, p. 73.) But he did not know, and had no reason to suspect, that his patient was a fugitive murderer. The most zealous advocate would not venture to assert that the evidence warrants such conclusion; much less will it be assumed by one acting under the solemn responsibilities of judge. Down, then, to

the time Mudd left home with Herold, after dinner, the evidence affords no pretext for asserting he was an accessory after the fact.

But if he was not then an accessory, he never was. It is shown that Herold turned back on the way to Bryantown, and when Mudd returned he and Booth had gone. And the evidence does not show that he suspected them of having been guilty of any wrong, until his wife told him, after they had gone, that the whiskers of the crippled man fell off as he came down stairs to go. True, Booth was guilty, and Mudd had shown his companion the route to Wilmer's; which was the only thing done by Mudd, from first to last, that could have implicated him, *even had he from the first known the crime and the criminal*. But when he did that, he did not know either; for he did not know the crime until he went to Bryantown, nor have even the least suspicion of the criminal, until after Booth had gone. I have read you the law—the *scienter* must be shown. Things not appearing and not existing stand before the law in the same category; and the guilty knowledge not appearing in evidence, in the eye of the law it does not exist. In this case it is not only not shown, but is negatived by the evidence. The conclusion most unfavorable to Mudd which the evidence can possibly justify is, that, having had his suspicions thoroughly aroused Saturday night, he delayed until Sunday noon to communicate them to the authorities. “*If A knows B hath committed a felony, but doth not discover it, this doth not make A an accessory after the fact.*” (1st Hale's Pleas of the Crown, 618.) “*Merely suffering a felon to escape will not charge the party so doing—such amounting to a mere omission.*” (Whar. Am. Crim. Law, 73.)

Can, then, Dr. Mudd be convicted as a conspirator, or an accessory before or after the fact, in the assassination? If this tribunal is to be governed in its findings by the just and time-honored rules of law, he cannot; if by some edict higher than constitutions and laws, I know not what to anticipate or how to defend him. With confidence in the integrity of purpose of the Court and its legal advisers, I now leave the case to them.

THOMAS EWING, JR.,
Of Counsel for Samuel A. Mudd.

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